Before the

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	)	
	)	
Rulemaking To Amend Parts 1, 2 , 21, and 25	)	CC Docket No. 92-297
Of The Commission's Rules To Redesignate	)	
The 27.5-29.5 GHz Frequency Band, To	)	
Reallocate The 29.5-30.0 GHz Frequency Band,	)	
To Establish Rules and Policies For Local	)	
Multipoint Distribution Service And For	)	
Fixed Satellite Services	)	

NYNEX REPLY COMMENTS

NYNEX Corporation ("NYNEX") hereby files its Reply Comments in the above-referenced proceeding. In the Fourth Notice of Proposed Rulemaking ("Fourth NPRM"), the Commission asked for comments inter alia addressing whether it should prohibit local exchange carriers ("LECs") and cable operators ("CableCos") from owning and/or operating communication systems provided via spectrum allocated for Local Multipoint Distribution Service ("LMDS") (NPRM ¶ 105-137). NYNEX joined with the other members of the United States Telephone Association ("USTA") in its initial Comments, pointing out that it would be inconsistent with Commission precedent, the Telecommunications Act of 1996 ("1996 Act"), and the public interest for the Commission to restrain competition by precluding LECs as prospective LMDS

providers.[1] We again share the views provided by USTA in its Reply Comments, but believe that it is necessary as well to provide our own detailed comments in order to ensure that the procompetitive purpose of the 1996 Act is not lost in the jockeying of commenters for regulatory advantages.

I. INTRODUCTION

It is ironic that this aspect of the Fourth NPRM has apparently been opened because of the passage of the 1996 Act.[2] Prior to the 1996 Act the Commission had "tentatively concluded that the Communications Act did not prohibit a LEC from acquiring an LMDS license" (Third NPRM ¶ 104). As the Commission pointed out, the comments received in response to the Third NPRM almost unanimously supported open LMDS eligibility for LECs, as well as others (Fourth NPRM ¶ 110),[3] and the Act itself eliminated barrier after barrier to competitive opportunity in order ". . . to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition . . . ."[4] There is simply no evidence that Congress in any way intended the

---

1 NYNEX has demonstrated its own interest in the availability and flexibility of this spectrum in our comments responding to the Third Notice of Proposed Rulemaking; adopted July 28, 1995 ("Third NPRM"). See, NYNEX Comments, filed September 7, 1995, and NYNEX Reply Comments, filed October 10, 1995. We have not earlier argued against CableCo eligibility to use LMDS spectrum and we do not so argue herein.

2 NPRM ¶ 105 ("we consider it important to obtain specific comment on how our policies towards LMDS eligibility would best promote the competitive objectives of the Act.").

3 See, e.g., US West Comments at pp. 2-5.

4 Joint Statement of Managers, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. Preamble (1996).

Commission to handicap prospective competitors by setting up new barriers at the same time that Congress was energetically taking down existing ones.

Nevertheless, numerous commenters now have supported regulatory preclusion of LECs from the use of LMDS as a means of limiting competition. Of course, the losers in such preclusion would be the customers, as technology development as well as consumer choice would be limited to only Commission-allowed competitors. In addition, the general public is injured as well because the spectrum could now be "purchased" by those Commission-allowed entities at less than its market value. Adoption of this approach is contrary to the Commission's general open eligibility and flexible use approach to available spectrum resources, and would be entirely inconsistent with its pro-competitive (rather than pro-competitor) policies. The Commission should reject the arguments of those that ask it to preclude prospective LMDS competitors.

II. NO LEGISLATIVE OR REGULATORY POLICY SUPPORTS PRECLUDING LECs FROM THE PROVISION OF LMDS SERVICES

Numerous commenters have provided detailed citation to Commission policy affirming the benefits of open eligibility and flexible spectrum use.[5] Similarly, they have pointed to the Congressional purpose to remove legal and regulatory barriers to

---

[5] See, e.g., Comments of Ameritech 3; Joint Comments of Bell Atlantic Corporation and SBC Communications, Inc. 6-9 ("Joint Comments"); Comments of BellSouth 3; Comments of US West 5-7; Comments of USTA 5-7.

competition.[6] Those who support preclusion of the LECs do not succeed in showing any legislative or regulatory policy support for such preclusion.

A. The 1996 Act Does Not Support Eligibility Restraints

Some commenters seek to find support for their request for regulatory barriers in provisions of the 1996 Act. Competition Policy Institute, for example, argues that the logic for precluding LECs and CableCos from participating in LMDS is "almost identical" to the rationale for preventing incumbent LECs and CableCos from "acquiring each other or engaging in joint ventures" (CPI 4). The analogy clearly fails: first, because the LMDS spectrum makes inter-service competition more likely, not less;[7] and second, because LMDS spectrum can be independently used to strengthen the customer satisfaction provided in a LEC's core business in order to compete more effectively with others in the open competitive market Congress envisioned. Indeed, WebCel supports preclusion by arguing that Section 652 prefers that LECs "build, not buy" their way into competition with CableCos (WebCel 12). This is precisely what the LMDS spectrum makes possible, unless the Commission precludes LEC involvement as argued by CPI, WebCel and others.

CPI also points to the MDS restriction on CableCo cross-ownership and the ban on LECs providing cable service as evidence of supportive public policy (CPI 8-9).[8] In fact,

---

[6] See, e.g., Ameritech 3-5; Joint Comments, 3-6; USTA 2-3.

[7] See, e.g., Joint Comments at pp. 11-13.

[8] See, also, WebCel 13.

the former was modified and relaxed in the 1996 Act, while the latter was eliminated entirely. These actions certainly provide no basis to believe that Congress meant to ban either LECs or CableCos from using LMDS spectrum for providing services.

Similarly, SkyOptics argues that Section 253(k) supports the eligibility preclusion (SkyOptics 2). But that Section of the 1996 Act states: "A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." There is no prospect of cross-subsidization here. Cross-subsidy concerns have been successfully addressed in the past by the Commission,[9] and are again subject to accounting rule revision at this time.[10] There is no basis to find in Section 253(k) a Congressional purpose for the Commission to erect barriers to competition.

SkyOptics also appears to suggest that LEC eligibility for the auction of LMDS spectrum would be unlawful under the antitrust laws (SkyOptics 3-10). Through a recitation of the operation of the 1992 *Merger Guidelines* and a demonstration that incumbent market shares measured under the *Guidelines*' HHI formula prove that the local exchange market is concentrated, SkyOptics attempts to prove that acquisition of LMDS licenses by an incumbent LEC violates antitrust merger laws. But the primary assumption made by SkyOptics in its merger analysis, that there is no difference between

---

[9] See, e.g., In the Matter Of Implementation Of The Non-Accounting Safeguards Of Sections 271 and 272 Of The Communications Act of 1934, as amended, Notice of Proposed Rulemaking, CC Docket No. 96-149, FCC 96-308, released July 18, 1996 at para 146.

[10] In The Matter Of Implementation Of The Telecommunications Act of 1996: Accounting Safeguards Under The Telecommunications Act Of 1996, Notice of Proposed Rulemaking, CC Docket No. 96-150, FCC 96-309, released July 13, 1996.

acquiring a license to use innovative technology for a procompetitive purpose and acquiring an actual competitor in a market, is simply wrong.[11]. Thus, the HHI concentration figures painstakingly calculated by SkyOptics have no application to the question presented by the Commission. The Commission has not asked whether the antitrust laws would be implicated if an incumbent LEC were to acquire one of its competitors in the local exchange market; the Commission has asked whether an incumbent LEC may bid to acquire an asset which may permit it to use innovative technology to bring more efficient and more robust service to its customers. The Commission is not as limited here, in its pursuit of the public interest, as SkyOptics suggests.

ComTech argues that LECs should be "prohibited from offering LMDS services in-region" until the criteria of the Section 271 checklist for in-region interLATA services is met (p. 10). Simply stated, this provision does not preclude BOC participation in either the auction for, or the development of, LMDS spectrum. Rather, by its terms, the Section 271 criteria must be met before in-region interLATA services are provided.[12] There are

---

[11] See, Merger Guidelines at 1.31 and 1.32.

[12] MCI goes further, seeking to argue here issues of RBOC competitive entry into long distance service which are not germane. Further, to the extent it argues for an "appropriate level of local exchange competition" as a precondition for such entry (MCI 8), MCI is asking the Commission to reverse the judgment of Congress that market share-based tests of competition are not a prerequisite to RBOC entry into the long distance market. See, also WebCel 14.

no restrictions in the 1996 Act on the media by which either intra- or interLATA services can be provided.

B. Regulatory Policy And The Public Interest Do Not Support Anti-Competitive Eligibility Limitations

Lacking firm support in the Act, others argue that regulatory considerations of the public interest compel the preclusion of the LECs from LMDS eligibility. MCI, for example, argues from the wholly anomalous position that, while it "agrees with the Commission that *competition is preferable to regulation*" (MCI 4), the Commission should "*impose eligibility restrictions* on incumbent LECs and MSOs, barring them from bidding on, holding an attributable interest in, or engaging in the post-auction acquisition of LMDS licenses in their existing service areas" (MCI 3) (emphasis supplied).[13] In fact, MCI urges that regulation limit competition. There is no defense for such an illogical position.

MCI attempts to support its position by arguing that: (1) the LMDS spectrum has great utility (MCI 4); and that (2) the Commission should "force" the LECs to compete

---

[13] Thus, MCI's requested relief exceeds even that requested by small entrepreneurs like RioVision which, while arguing against LEC eligibility, points out that:

> "[s]uch restrictions do not necessarily preclude participation by LECs and/or MSO's in LMDS services should an LMDS licensee determine that disaggregating its license and assigning spectrum to a LEC or cable operator would serve both the public interest and the license's commercial purposes." (p.3).

only on a wireline basis (MCI 5-6).[14] There is no benefit -- and a great deal of competitive and economic advantage lost -- by adoption of this approach. If the spectrum provides substantial benefits, MCI does not explain why those benefits should not be available for the LECs and their customers.[15]

MCI and others argue that the LECs will fail to use the LMDS spectrum for the public benefit. However, given the marketplace value placed on available spectrum, there is no realistic prospect that LECs will buy and "warehouse" this technology to restrain competitive uses (MCI 6-7). In fact, the auction process specifically addresses the presupposition of commenters, like CPI, that argue that the incentives of the telephone company to use LMDS for telephony "will be less than the incentives of any other entity that could own the license" (CPI 7).[16] If this is in fact the case, others will outbid the LECs for spectrum; if not, preclusion of the LECs will deny the public benefits that an open market should provide. Similarly, there is no a priori basis for the Commission to conclude, as argued by CellularVision, that LMDS is only able to "realize its fullest potential as competition to LECs and cable operators" (CellularVision 4). Indeed, only if there were true economic advantage to LEC use of this spectrum as a replacement,

---

[14] It is not too difficult to imagine MCI's vehement adverse reaction if the Commission were wrongly to follow this same approach by denying it the use of DBS or other new technologies, in order to force it to compete only on a wireline basis.

[15] As indicated earlier, NYNEX is actively evaluating the capabilities of LMDS technology to meet customer needs. NYNEX participated in the Negotiated Rulemaking Committee earlier instituted in Docket 92-297, and is conducting experiments at 28 GHz pursuant to 47 C.F.R. 5.202(a) (File # 4253-EX-MR-94).

[16] See, e.g., WebCel 15-17.

complimentary or supplementary telecommunication technology; or to compete in new markets like video services, would the LECs be interested in its use.

Others appear to fear, like SkyOptics, that considerations of sustained "monopoly profits" will somehow make it possible for BOCs to uneconomically outbid others (SkyOptics 9).[17] However, there is plainly no prospect for monopoly profits in the current environment of exchange access and, indeed, there is a far greater risk of insufficient revenues under the terms of the Commission's recent Interconnection Order.[18]

Finally, proponents of the eligibility restraint argue all sides of the issue of whether considerations of operating efficiency favor BOC eligibility (Fourth NPRM ¶ 127). MCI argues that LECs have no inherent cost efficiencies and, thus, can be precluded without economic loss (MCI 5-6). ComTech argues that in-region LEC efficiencies are so substantial that LECs must be precluded because an "incumbent LEC can meet any build-out and/or service requirement at a substantially lower cost than would a new entrant" (ComTech 14). To these diametrically opposing positions, CPI adds its own view that efficiency is not even a legitimate Congressional or regulatory "goal" (CPI 11). What can, and must be gleaned from these disparate arguments is that the marketplace -- not regulatory restrictions on eligibility -- should be allowed to govern the highest value use

---

[17] See, also, WebCel 14, referencing imaginary "continued economic rents."

[18] In The Matter Of Implementation Of The Local Competition Provisions In The Telecommunications Act of 1996, First Report and Order, CC Docket No. 96-98, FCC 96-325, released August 8, 1996, at p. 7.

of this spectrum.[19] This is also the direction of the new national telecommunications policy embedded in the 1996 Act.

III. CONCLUSION

For all the foregoing reasons, the Commission should permit any entity to acquire and/or use the available LMDS spectrum for the flexible provision of communications service -- as technology may permit -- to the public. It should reject the proposals of commenters seeking to establish regulatory barriers to competition.

Respectfully submitted,

NYNEX Corporation

By: _____
Donald C. Rowe
John P. Walsh

1111 Westchester Avenue
White Plains, New York 10604
(914) 644-6993

Its Attorneys

Dated: August 22, 1996

---

[19] As CPI itself states (p. 11):

> "It is simply impossible for the Commission to determine at this nascent state in the development of LMDS technology which company may or may not be able to provide service not efficiently. Some might even argue that, should the FCC try to engage in such a prediction of the future, the FCC would be engaging in "industrial policy," or that the FCC would be attempting pick winners and losers."

CERTIFICATE OF SERVICE

I, Susan Sonnenberg, hereby certify that on the 22nd day of August, 1996, a copy of the foregoing NYNEX Reply Comments in Docket No. CC 92-297 was served on each of the parties listed on the attached Service List by first class U.S. mail, postage prepaid.

Susan Sonnenberg

Susan Sonnenberg

Caressa D. Bennet
Gregory Whiteaker
Bennet & Bennet, PLLC
1019 Nineteenth Street, N.W.
Suite 500
Washington, DC 20036

Curtis T. White
Allied Associated Partners, LP
GELD Information Systems
4201 Connecticut Ave., NW
Washington, DC 20008-1158

Frank Michael Panek
Attorney for Ameritech
Room 4H84
2000 West Ameritech Center Drive
Hoffman Estates, IL 60195-1025

Marilyn Mohrman-Gillis
Lonna M. Thompson
Association of America's
Public Television Stations
1350 Connecticut Avenue, N.W.
Suite 200
Washington, DC 20036

Paula A. Jameson
Gregory Ferenbach
Public Broadcasting Service
1320 Braddock Place
Alexandria, Virginia 22314

James G. Pachulski
Bell Atlantic Corporation
1320 N. Courthouse Road, 8th Floor
Arlington, Virginia 22201

Robert M. Lynch
Durward D. Dupe
Paul E. Dorin
SBC Communications, Inc.
One Bell Center, Suite 3520
St. Louis, Missouri 63101

BellSouth Corporation
Walter H. Alford
John F. Beasley
William B. Barfield
Jim O. Llewllyn
1155 Peachtree Street, NE, Suite 1800
Atlanta, GA 30309-2641

BellSouth Corporation
David G. Frolio
David G. Richards
1133 21st Street, NW
Washington, DC 20036

John Windhausen
Ronald J. Binz
Debra Berlyn
Competition Policy Institute
1156 15th St., N.W. Suite 310
Washington, DC 20005

Mobile Source Air Pollution Reduction
Review Committee
21865 East Copley Drive
Diamond Bar, CA 91765

Don Hamada
Department of Transportation Services
City and County of Honolulu
Pacific Park Plaza
711 Kapiolani Boulevard, Suite 1200
Honolulu, Hawaii 96813

Daniel L. Brenner
Diane B. Burstein
David L. Nicoll
Counsel for the National Cable Television Association, Inc.
1724 Massachusetts Avenue, N.W.
Washington, D.C. 20036

David Cosson
L. Marie Guillory
National Telephone Cooperative Association
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Joe D. Edge
Sue W. Bladek
Drinker, Biddle & Reath
Attorneys for Puerto Rico Telephone Company
900 Fifteenth Street, N.W.
Washington, D.C. 20005

Mateo R. Camarillo
Opportunities Now Enterprises, Inc.
8303 Clairemont Mesa Blvd. #201
San Diego, CA 92111

Lucy W. Eggerth
Pacific Telesis Group
2410 Camino Ramon, Suite 100
San Ramon, CA 94583

Pioneer Telephone Association, Inc.
120 North Baughman Street
Ulysses, Kansas 67880-0707

Jon Schill
RioVision, Inc.
P.O. Box 1065
1800 East Highway 83
Weslaco, TX 78596

Allen Holden, Jr.
The City of San Diego
Executive Complex
1010 Second Avenue
San Diego, CA 92101

John A. Davis
COMSTAT Communications, Inc.
5 Cherry Hill Drive
Danvers, MA 01923

Jason Priest
ComTech Associates, Inc.
600 E. Las Colinas Boulevard #540
Irving, Texas 75039

Michael R. Gardner, P.C.
Charles R. Milkis
Attorneys for CellularVision Technology and Telecommunications, L.P.
1150 Connecticut Avenue, Suite 710
Washington, D.C. 20036

Douglas G. Lockie
Endgate Corporation
321 Soquel Way
Sunnyvale, CA 94086

Peter A. Rohrbach
Karis A. Hastings
Kyle D. Dixon
Hogan & Hartson L.L.P.
Attorneys for GE American Communications, Inc.
555 Thirteenth Street, N.W.
Washington, D.C. 20004

Douglas A. Gray
Hewlett Packard Company
1501 Page Mill Road, 4A-F
Palo Alto, CA 94304

John G. Holland
Latham & Watkins
Attorney for Hughes Communications Galaxy, Inc.
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004

Timothy E. Welch
Hill & Welch
Attorney for ICE-G, Inc.
1330 New Hampshire Avenue, N.W.
Suite #113
Washington, D.C. 20036

Raymond G. Bender, Jr.
Thomas K. Gump
Dow, Lohnes & Albertson
Attorneys for Lockheed Martin Corporation
1200 New Hampshire Avenue, Suite 800
Washington, D.C. 20036-6802

Larry A. Blosser
Donald J. Elardo
MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Robert L. Shearing
SkyOptics, Inc.
2450 Marilouise Way, Suite 100
San Diego, CA 92103

Fletcher, Heald & Hildreth, P.L.C.
Attorneys for Roseville Telephone Company
1300 North 17th Street
11th Floor
Rosslyn, Virginia 22209

Gerald P. McCartin
Mitchell Lazarus
Arent Fox Kintner Plotkin & Kahn
Counsel for Sierra Digital Communications, Inc.
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036-5339

Robert L. Pettit
Michael K. Baker
Wiley, Rein & Fielding
Attorneys for Texas Instruments, Inc.
1776 K Street, N.W.
Washington, D.C. 20006

Harry Felker, Mayor
City of Topeka, Kansas
215 E. 7th Street
Rm. 352
Topeka, KS 66603

Coleen M. Egan Hehnreich
Norm Curtright
James T. Hannon
US West, Inc.
1020 19th Street, N.W.
Suite 700
Washington, D.C. 20036

Glenn B. Manishin
Blumenfeld & Cohen-Technology Law Group
Counsel for WebCel Communications, Inc.
1615 M Street, N.W., Suite 700
Washington, D.C. 20036

Paul J. Sinderbrand
Wilkinson, Barker, Knauer & Quinn
Attorney for Wireless Cable Association International, Inc.
1735 New York Avenue, N.W.
Washington, DC 20006-5209

National Telephone Cooperative Assoc.
David Cosson
L. Marie Guillory
2626 Pennsylvania Avenue, N.W.
Washington, D.C. 20037

Hargray Telephone Company, Inc.
David L. Nace
Marci E. Greenstein
Lukas, McGowan, Nace & Gutierrez, Chartered
1111 19th Street, N.W.
Twelfth Floor
Washington, D.C. 20036

Michael J. Karson
Attorney for Ameritech
Room 4H88
2000 West Ameritech Center Drive
Hoffman Estates, IL. 60196-1025

Bell Atlantic
Michael E. Glover
Betsy L. Anderson
1320 N. Court House Road
8th Floor
Arlington, VA 22201

Bellsouth Telecommunications, Inc.
M. Robert Sutherland
Michael A. Tanner
Theodore R. Kingsley
4300 Southern Bell Center
675 W. Peachtree Street, N.E.
Atlanta, GA 30375

GTE Service Corporation
Ward W. Wueste, Jr., HQE03J43
John F. Raposa, HQE03J27
P.O. Box 152092
Irving, TX 7515-2092

GTE Service Corporation
Gail L. Polivy
1850 M Street, N.W.
Suite 1200
Washington, D.C. 20036

Pacific Telesis Group
Pacific Bell
Nevada Bell
Christopher L. Rasmussen
2600 Camino Ramon, Rm. 2W901
San Ramon, California 94583